A

Public Prosecutor v Kuala Dimensi Sdn Bhd & Ors

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-09–248–11 OF 2011
ABDUL RAHMAN SEBLI, HARMINDAR SINGH AND SURAYA OTHMAN JJCA
4 JULY 2018

C

Criminal Procedure — Forfeiture — Seizure of property — Application to forfeit seized property as proceeds from unlawful activity — Whether conditions in s 56 of the AMLATFA had been established — Whether specific proceeds from predicate offences under ss 409 and 420 of the Penal Code were linked to offence of D *money laundering — Whether PP identified nature and extent of participation of respondents with offence of money laundering — Whether appellant adduced sufficient evidence to prove that predicate offences were linked to offence of money laundering under s 4 of the AMLATFA — Whether standard of proof was on balance of probabilities*

E

The Malaysian Government had planned to convert a piece of land situated in Kelang ('the land'), belonging to the first respondent, Kuala Dimensi Sdn Bhd ('KDSB'), into the Port Klang Free Zone ('the PKFZ project'). To this end the Port Klang Authority ('PKA') entered into a sale and purchase agreement ('the F SPA') with KDSB for the purchase price of RM1,088,456,000. Pursuant to the SPA, PKA and KDSB entered into a development agreement by which KDSB was appointed as the turnkey contractor to, inter alia, design and construct on the first phase of the development of the land. At all times the relationship between PKA and KDSB was one of client and turnkey contractor respectively G and governed by contract. In the course of time, several contractual disputes arose between PKA and KDSB, which resulted in several civil suits. The PP claimed that money and property in the custody of the respondents had been obtained through the offence of money laundering. It was the prosecution's case that the property it sought to seize and applied to forfeit were gained by the H respondents in connection with the commission of offences under s 409 (criminal breach of trust) and s 420 (cheating) of the Penal Code by four accused persons. The PP thus filed a notice of motion pursuant to s 56(1) of the Anti-Money Laundering, Anti-Terrorism Financing Act 2001 ('the AMLATFA') to forfeit the seized money and property on the basis that the I same had been obtained as a result of or in connection with an offence under s 4(1) of the AMLATFA, which is principally concerned with the proceeds from an unlawful activity and which activity constitutes a serious offence. The monies and properties that the PP seized and applied to forfeit consisted of various bank accounts held by the nine respondents, bankers' cheques and

various pieces of land situated in Malaysia. The High Court judge found that there was no link between the property sought to be forfeited and the offence of money laundering and that the PP had failed to fulfill the requirements of s 56 of the AMLATFA, in that it had not adduced sufficient evidence to prove that the predicate offences, namely the offences of breach of trust and cheating allegedly committed by the four accused persons, were linked to the offence of money laundering under s 4(1) of the AMLATFA. As such, the High Court dismissed the PP's motion and made an order that the property was to be released to all the respondents. The PP appealed against the decision of the High Court and submitted that the High Court judge had erred in law and in fact when he held that the prosecution had failed to establish the ingredients of forfeiture of the property under s 56 of the AMLATFA. The Court of Appeal found that since the property sought to be seized had been released to the respondents by the High Court order and the PP had not secured a stay or preservation order of the subject matter, the substratum of the appeal was no longer in existence, rendering the appeal academic. The Court of Appeal thus dismissed the PP's appeal. The PP then appealed to the Federal Court, which allowed the PP's appeal and ordered for the appeal to be remitted to the Court of Appeal to be heard on its merits.

Held, dismissing the appeal:

(1) Section 56 of the AMLATFA when read together with s 4 establishes the necessity for the existence of a predicate offence. When the PP resorted to the application under s 56(2) of the AMLATFA, four accused persons had already been charged under the predicate offence under ss 409 and 420 of the Penal Code. In the circumstances, the specific proceeds from the said predicate offences under ss 409 and 420 of the Penal Code which offences the PP alleged were committed by the four accused should be linked to the offence of money laundering. This was crucial and was a prerequisite to s 56(2) for an order for forfeiture under the AMLATFA to be made. However, the charge under s 409 against one of the accused persons had been withdrawn and the other three accused persons had been acquitted of the charges under s 420 at the end of prosecution without their defence being called. As such, the PP had not established that the property seized had been obtained as a result of or in connection with the offences under ss 409 or 420 or connected with an offence of money laundering committed by the four accused persons under s 4 of the AMLATFA (see paras 37, 40, 41, 55 & 62–64).

(2) It is trite law that an application made under s 56 of the AMLATFA requires proper proof of relevant facts which in turn should be supported by admissible evidence so as to enable the court to arrive at a correct decision since the court was not merely exercising a ministerial or executive character when adjudicating a s 56 application. However, in the present case, the PP through the investigating officers merely produced

via their affidavits allegations of facts and charges brought against third parties, namely the four accused persons, who had charges withdrawn or had all been acquitted and discharged. It was thus insufficient for the PP to say, that just because the four accused persons had been charged, that in itself without more, was sufficient to establish that on a balance of probabilities, an offence of money laundering under s 4(1) of the AMLATFA had been committed by them. The High Court judge was also correct in finding that the PP had failed to identify the nature and extent of the participation of the respondents with the offence of money laundering. Although the PP had argued that the four accused persons had committed money laundering, it had failed to show in what manner the respondents had abetted the four accused persons (see paras 69–72 & 77–80).

(3) The forfeiture proceeding under s 56 is a civil forfeiture proceeding as stated in ss 56(4) and 70(1) of the AMLATFA where the standard of proof is on a balance of probabilities. Therefore, there was no prejudice arising as a result of the usage of affidavit evidence because all parties were given the opportunity to rebut any allegations made and also to disclose whatever evidence necessary in support of their necessary contentions. However, in his affidavit the PP's investigating officer believed that the offence of money laundering had been committed because he had failed to sufficiently appreciate the material facts governing the contractual relationship between KDSB and PKA. Further having withdrawn the charges under s 409 of the Penal Code, the predicate/serious offence, against one of the four accused, who was at the material time the Managing Director of Lembaga Pelabuhan Kelang (LPK), the PP is deemed to have admitted that there was no predicate/serious offence that had been established to warrant an application to be made to the High Court judge for the forfeiture of the property (see paras 103–105).

(4) The High Court judge had erred in finding the PP's investigating officer guilty of any suppression of evidence. However, there was an apparent non-disclosure of facts on his part. Such non-disclosure was fatal to the PP's case since it is trite law that failure on the part of the appellant to provide full disclosure about the entirety of certain matters would be fatal to their case (see para 110).

(5) There was no proof that the money sought to be seized and forfeited were from the subject-matter of or was used in the commission of the offence of money laundering or that they were connected to the two predicate offences under ss 409 and 420 of the Penal Code. The PP had tendered no evidence to prove, on the balance of probabilities, that the money and property sought to be forfeited, was in fact the proceeds from the predicate offences. The documents in support of payments tendered by the PP were payments made for a variety of works in relation to the

development agreement between KDSB and PKA. The PP failed to establish that the money and property sought to be forfeited is 'as a result of' or 'connected with' the offence of money laundering. The respondents, on the other hand, have tendered evidence to prove that the money received for works done was paid to KDSB from the funders pool of monies over time and the source documents for the funding exercise had been disclosed, where the legality of the funding exercise was not in dispute. As such, the predicate offence had not been established and there was no link between the proceeds derived from the predicate offence and the property to be seized or forfeited. In the circumstances, there was no merit in this appeal to warrant appellate intervention (see paras 111–116 & 120).

[Bahasa Malaysia summary

Kerajaan Malaysia telah bercadang untuk menjadikan sebidang tanah yang terletak di Kelang ('tanah itu'), yang dimiliki oleh responden pertama, Kuala Dimensi Sdn Bhd ('KDSB'), ke dalam Zon Bebas Pelabuhan Klang ('projek ZBPK'). Akibat perkara ini Pihak Berkuasa Pelabuhan Klang ('PBPK') telah menandatangani perjanjian jual beli ('PJB') dengan KDSB dengan harga jualan sebanyak RM1,088,456,000. Akibat PJB itu, PBPK dan KDSB telah menandatangani perjanjian pembangunan yang KDSB telah dilantik sebagai kontraktor utama, antaranya, untuk mereka membentuk dan membina fasa pertama pembangunan tanah itu. Pada setiap masa, hubungan antara PBPK dan KDSB adalah hubungan antara seorang pelanggan dengan kontraktor utama masing-masing dan ditadbir secara kontrak. Setelah beberapa lama, beberapa pertikaian kontrak timbul antara PBPK dan KDSB, yang membawa kepada saman sivil. Pihak pendakwa raya menyatakan bahawa wang dan harta dalam jagaan responden telah diperoleh secara pengubahan wang haram. Pendakwaan menyatakan bahawa harta yang hendak dirampas dan dimohon untuk dilucut hak telah diperoleh oleh responden berkaitan dengan kesalahan di bawah s 409 (kesalahan pecah amanah) dan s 420 (penipuan) Kanun Keseksaan oleh empat orang tertuduh. Pihak pendakwa raya kemudiannya telah memfailkan notis usul menurut s 56(1) Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil daripada Aktiviti Haram 2001 ('Akta') untuk melucuthak wang tunai dan harta yang dirampas atas dasar bahawa wang tunai dan harta itu diterima akibat daripada atau berkaitan dengan kesalahan di bawah s 4(1) Akta, yang secara asasnya lebih menumpukan kepada hasil daripada aktiviti yang menyalahi undang-undang dan aktiviti itu merupakan kesalahan berat. Wang tunai dan harta yang dirampas oleh pendakwa raya dan dimohon untuk dilucut hak terdiri daripada pelbagai akaun bank atas nama sembilan orang responden, cek bank dan beberapa bidang tanah yang terletak di Malaysia. Hakim Mahkamah Tinggi mendapati tidak terdapat hubungan antara harta yang hendak dilucut hak dengan kesalahan pengubahan wang haram dan bahawa pendakwa raya telah gagal memenuhi kehendak s 56 Akta, iaitu ia telah gagal mengemukakan

keterangan yang mencukupi untuk membuktikan bahawa kesalahan predikat, iaitu kesalahan pecah amanah dan penipuan yang dikatakan dilakukan oleh empat orang tertuduh, mempunyai kaitan dengan kesalahan pengubahan wang haram di bawah s 4(1) Akta. Oleh yang demikian, Mahkamah Tinggi telah menolak usul oleh pendakwa raya dan membuat perintah supaya harta yang dirampas itu dikembalikan kepada semua responden. Pihak pendakwa raya merayu terhadap keputusan Mahkamah Tinggi itu dan menghujahkan bahawa hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan fakta apabila beliau memutuskan pihak pendakwaan telah gagal untuk membuktikan unsur pelucuthakan harta di bawah s 56 Akta. Mahkamah Rayuan mendapati memandangkan harta yang dirampas telah dikembalikan kepada responden melalui perintah oleh Mahkamah Tinggi dan pihak pendakwa raya telah tidak memohon penangguhan atau perintah pengekalan tentang hal perkara itu, asas rayuan itu tidak lagi wujud, dan menyebabkan rayuan ini menjadi akademik. Pihak Mahkamah Rayuan kemudiannya menolak rayuan pendakwa raya itu. Pihak pendakwa raya kemudiannya merayu ke Mahkamah Persekutuan, yang kemudiannya membenarkan rayuan pihak pendakwa raya dan memerintahkan supaya rayuan itu dipulangkan kepada Mahkamah Rayuan dan didengar berdasarkan meritnya.

Diputuskan, menolak rayuan:

(1) Seksyen 56 Akta apabila dibaca bersama s 4 mewujudkan keperluan bagi kewujudan kesalahan predikat. Apabila pihak pendakwa raya menggunakan permohonan di bawah s 56(2) Akta, empat orang tertuduh telah pun dituduh di bawah kesalahan predikat di bawah ss 409 dan 420 Kanun Keseksaan. Dalam keadaan ini, hasil spesifik daripada kesalahan predikat di bawah ss 409 dan 420 Kanun Keseksaan, kesalahan yang mana dituduh oleh pihak pendakwa raya dilakukan oleh keempat-empat tertuduh hendaklah dikaitkan dengan kesalahan pengubahan wang haram. Ini adalah penting dan merupakan prasyarat kepada s 56(2) bagi perintah pelucuthakan di bawah Akta diberikan. Walau bagaimanapun, pertuduhan di bawah s 409 terhadap salah seorang tertuduh telah ditarik balik dan tiga tertuduh yang lain telah dilepaskan dan dibebaskan daripada pertuduhan di bawah s 420 di akhir kes pendakwaan tanpa pembelaan mereka dipanggil. Oleh yang demikian, pihak pendawa raya tidak berjaya membuktikan bahawa harta yang dirampas telah diperoleh sebagai akibat daripada atau berkaitan dengan kesalahan di bawah s 409 atau 420 atau berkaitan dengan kesalahan pengubahan wang haram yang dilakukan oleh keempat-empat tertuduh di bawah s 4 Akta (lihat perenggan 37, 40, 41, 55 & 62–64).

(2) Adalah merupakan undang-undang yang mantap bahawa permohonan di bawah s 56 Akta menghendaki pembuktian fakta yang relevan yang selanjutnya hendaklah disokong oleh keterangan boleh terima yang seterusnya membolehkan mahkamah untuk membuat keputusan yang

tepat kerana mahkamah bukan sahaja melaksanakan tindakan kementerian atau eksekutif apabila mendengar permohonan s 56. Walau bagaimanapun, dalam kes ini, pihak pendakwa raya melalui pegawai penyiasat hanya mengemukakan pertuduhan tentang fakta dan pertuduhan yang dibawa terhadap pihak ketiga, melalui afidavit mereka, iaitu keempat-empat tertuduh, yang pertuduhan telah ditarik balik atau kesemuanya telah dilepaskan dan dibebaskan. Oleh itu, adalah tidak memadai bagi pihak pendakwa raya untuk menyatakan, hanya kerana keempat-empat tertuduh telah dituduh, maka memadai untuk membuktikan atas imbangan kebarangkalian, kesalahan pengubahan wang haram di bawah s 4(1) Akta telah dilakukan. Hakim Mahkamah Tinggi juga adalah betul apabila mendapati bahawa pihak pendakwa raya telah gagal untuk mengenal pasti keadaan dan takat penglibatan responden dengan kesalahan pengubahan wang haram. Walaupun pihak pendakwa raya telah menghujahkan bahawa keempat-empat tertuduh telah melakukan pengubahan wang haram, ia telah gagal menunjukkan dalam keadaan bagaimana pihak responden telah bersubahat dengan keempat-empat tertuduh (lihat perenggan 69–72 & 77–80).

(3) Prosiding pelucuthakan di bawah s 56 merupakan prosiding pelucuthakan sivil sebagaimana yang dinyatakan dalam ss 56(4) dan 70(1) Akta yang mana beban pembuktian adalah atas imbangan kebarangkalian. Oleh yang demikian, tiada prejudis yang timbul akibat daripada penggunaan afidavit keterangan kerana kesemua pihak telah diberikan peluang untuk membalas apa-apa pertuduhan yang dibuat dan juga untuk menzahirkan apa juga keterangan yang perlu untuk menyokong tuntutan mereka. Walau bagaimanapun, dalam afidavitnya, pegawai penyiasat pihak pendakwa raya percaya bahawa kesalahan pengubahan wang haram telah dilakukan kerana beliau telah gagal untuk menilai fakta material yang berkenaan dengan hubungan kontraktual antara KDSB dan PBPK dengan sewajarnya. Selanjutnya, apabila pertuduhan di bawah s 409 Kanun Keseksaan ditarik balik, kesalahan predikat/berat, terhadap salah seorang daripada empat orang tertuduh itu, yang pada masa yang material merupakan Pengarah Urusan Lembaga Pelabuhan Kelang (LPK), pihak pendakwa raya disifatkan telah mengakui bahawa tidak terdapat kesalahan predikat/berat yang telah dilakukan bagi membolehkan permohonan untuk pelucuthakan harta yang dirampas itu dibuat oleh hakim Mahkamah Tinggi (lihat perenggan 103–105).

(4) Hakim Mahkamah Tinggi telah terkhilaf apabila mendapati bahawa pegawai penyiasat pihak pendakwa raya bersalah kerana menyembunyikan keterangan. Walau bagaimanapun, terdapat ketidakzahiran fakta yang nyata dalam perkara ini. Ketidakzahiran itu amat memudaratkan kes pendakwa raya memandangkan ia merupakan undang-undang yang mantap bahawa kegagalan pihak perayu untuk

memberikan penzahiran penuh tentang keseluruhan hal perkara memudaratkan kes mereka (lihat perenggan 110).

(5) Tidak terdapat bukti bahawa wang yang hendak dirampas dan dilucuthak itu daripada hal perkara atau digunakan dalam pelakuan kesalahan pengubahan wang haram atau ia berkaitan dengan dua kesalahan predikat di bawah ss 409 dan 420 Kanun Keseksaan. Pihak pendakwa raya telah tidak mengemukakan keterangan bagi membuktikan, atas imbangan kebarangkalian, bahawa wang tunai dan harta yang hendak dilucut hak itu merupakan hasil daripada kesalahan predikat itu. Dokumen yang menyokong pembayaran yang dikemukakan oleh pihak pendakwa raya merupakan pembayaran bagi pelbagai pekerjaan yang dibuat yang berkaitan dengan perjanjian pembangunan antara KDSB dan PBPK. Pihak pendakwa raya telah gagal membuktikan bahawa wang tunai dan harta yang hendak dilucut hak ialah 'akibat daripada' atau 'berkaitan dengan' kesalahan pengubahan wang haram. Pihak responden pula telah mengemukakan keterangan untuk menunjukkan bahawa wang yang diterima bagi kerja yang dijalankan telah dibayar kepada KDSB daripada *funders pool of monies* dan dokumen sumber bagi pelaksanaan pembiayaan itu telah dizahirkan, yang mana kesahan pelaksanaan pembiayaan itu tidak dicabar. Oleh itu, kesalahan predikat tidak berjaya dibuktikan dan tiada hubungan antara hasil yang diambil daripada kesalahan predikat dengan harta yang hendak dirampas atau dilucut hak. Dalam keadaan ini, tidak terdapat merit dalam rayuan ini yang membolehkan campur tangan mahkamah rayuan (lihat perenggan 111–116 & 120).]

Notes

For cases on seizure of property, see 5(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2609–2610.

Cases referred to

Hew Sook Ying v Hiw Tin Hee @ Hew Hee [1992] 2 MLJ 189; [1992] 3 CLJ 1325, SC (refd)

Husdi v PP [1980] 2 MLJ 80, FC (refd)

Husdi v PP [1979] 2 MLJ 304, HC (refd)

Ketua Polis Negara & Anor v Gan Bee Huat and other appeals [1998] 3 MLJ 86; [1998] 3 CLJ 1, SC (refd)

Noor Ismahanum Mohd Ismail v PP [2018] MLJU 205, CA (refd)

Pendakwa Raya v Abdul Razak and Ors [2009] MLJU 195; [2009] 1 LNS 322, HC (refd)

Pendakwa Raya v Raja bin Sharif [2009] MLJU 466; [2009] 1 LNS 509, HC (refd)

PP v Billion Nova Sdn Bhd & Ors [2016] MLJU 1823; [2016] 2 CLJ 763, CA (refd)

PP v Dato' Seri Anwar bin Ibrahim [2010] 2 MLJ 353; [2010] 4 CLJ 331, CA (refd)
PP v Lau Kee Hoo [1983] 1 MLJ 157, FC (refd)
PP v Thong Kian Oon & Ors [2012] 10 MLJ 140; [2012] 8 CLJ 119, HC (refd)
R v Ward, Marles & Graham [1989] 1 Qd R 194, SC (refd)
Tan Teik Soon & Ors v PP [2004] 2 MLJ 608, HC (refd)

Legislation referred to

Anti-Corruption Act 1997 (repealed by the Malaysian Anti-Corruption Commission Act 2009) s 37(3)
Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 3, 4, 4(1), 22, 26, 32(2), 53, 56, 56(1), (1)(a), (1)(b), (1)(c), (1)(d), (2), (2)(a)(i), (2)(a)(ii), (2)(a)(iii), (2)(a)(iv), (4), 61, 61(2), 70, 70(1), (2), 78, Second Schedule
Betting Act 1953 s 6(4)
Criminal Procedure Code ss 112, 424
Dangerous Drugs (Forfeiture of Property) Act 1988 s 32
Federal Constitution art 13
Internal Security Act 1960 (repealed by the Security Offences (Special Measures) Act 2012)
Penal Code ss 409, 420
Rules of Court 2012 O 41

Appeal from: Criminal Trial No 44–257 of 2010 of 2016 (High Court, Kuala Lumpur)

Faizah Mohd Salleh (Hanim Mohd Rashid and Samihah Rhazali with her) for the appellant.
Prem Ramachandran (Shankar Govinth Balachandran with him) (Kumar Partnership) for the first, second, third, fourth, fifth and sixth respondents.
K Kumaraendran (Kumar & Co) for the seventh and eight respondents.
Shamsul Sulaiman (Shamsul Sulaiman) for the ninth respondent.

Suraya Othman JCA (delivering judgment of the court):

INTRODUCTION

[1] At the High Court, the appellant/public prosecutor ('PP') through a notice of motion dated 23 November 2010 moved the High Court to forfeit money and property belonging to the first till the ninth respondents: first respondent is Kuala Dimensi Sdn Bhd ('KDSB'); second respondent is Transshipment Megahub Bhd ('TMB'); third respondent is Coastal Skyline Sdn Bhd ('CSSB'); fourth respondent is Wijaya Baru Aviation Sdn Bhd ('WBASB'); fifth respondent is Wijaya Baru Sdn Bhd ('WBSB'); sixth

respondent is Wijaya Baru Construction Sdn Bhd ('WBCSB'); seventh respondent is Dato' Seri Tiong King Sing ('Dato' Seri Tiong'); eighth respondent is Law Ka Hieng ('Law'); and the ninth respondent is Perbadanan Kemajuan Negeri Selangor ('PKNS') respectively.

[2] The notice of motion filed by the PP at the High Court was brought pursuant to s 56(1) of the Anti-Money Laundering, Anti-Terrorism Financing Act 2001 (Act 613) ('the AMLATFA') on the basis that the said movable and immovable property ('property') had been obtained as a result of or in connection with an offence under sub-s 4(1) of the AMLATFA.

[3] The High Court then on 4 November 2011 dismissed the PP's motion and made an order that the property was to be released to all the respondents as the PP has failed to prove that such property had been obtained as a result of or in connection with an offence under sub-s 4(1) of the AMLATFA as required under s 56(1) of the same.

[4] The PP, dissatisfied, appealed against the decision of the High Court.

[5] On 13 November 2014, a different panel of the Court of Appeal dismissed the PP's appeal based on principally preliminary issues. The Court of Appeal found that since the property had been released to the respondents by the High Court order on 4 November 2011 and the PP had not secured a stay or preservation order of the subject matter, the substratum of the appeal was no longer in existence, rendering the appeal academic.

[6] The PP then appealed to the Federal Court on 28 March 2017. The Federal Court allowed the PP's appeal and ordered for the appeal to be remitted to the Court of Appeal to be heard on its merits.

FACTS OF THE CASE

[7] Sometimes in 1993, the Government of Malaysia had a vision to develop and transform Port Klang into a national load centre as well as a regional transshipment hub. Towards this end, the Port Klang Free Zone ('PKFZ') was created and approved. The Malaysian Government had identified the land belonging to the first respondent ('KDSB') to carry out the PKFZ project. The first respondent was then appointed as the turnkey contractor for the development of PKFZ.

[8] To realise this vision, a sale and purchase agreement dated 12 November 2002 ('SPA') was entered into between Port Klang Authority ('PKA') and KDSB where PKA agreed to purchase from KDSB a piece of land held under Pajakan Negeri 7324 Lot 67894 Daerah and Mukim of Kelang in the State of

Selangor, which land measured approximately 43,538,200 sqft or 999.5 acres ('the land') for the price of RM1,088,456,000 ('the purchase consideration'). A

[9] Prior to the SPA, KDSB had already submitted and obtained approvals for a mixed development to be undertaken on the land for their benefit. Initial works then commenced according to the necessary specifications to cater for the said mixed development. The development for which the approvals were obtained was alleged to be different in substance and in form to the development envisaged for the Port Klang PKFZ project. B

[10] Pursuant to the SPA, PKA and KDSB entered into a development agreement dated 27 February 2003 ('DA1') by which KDSB was appointed as the turnkey contractor, to, inter alia, design and construct on Phase 1 of the land, which comprised about 400 acres ('Phase 1 development') at a development cost of RM400m. C D

[11] The terms of the DA1 were subsequently varied by the same parties vide a supplemental agreement dated 26 May 2003 ('DA1A') which facilitated KDSB to raise funds to finance the development cost of Phase 1 development. E

[12] On the advice of PKA's consultant, Jebel Ali Free Zone International ('JAFZI'), PKA decided to develop the entire land in a single phase. This was done to reduce the costs of the development by eliminating two sets of mobilisation and demobilisation costs. As such, the provisions of DA1 were varied by a supplemental agreement dated 27 March 2004 ('DA2') under which the development of one thousand (1,000) acres were to be undertaken at a cost of RM1 billion. F

[13] Following the advice of JAFZI, letters of support to undertake the development in one single phase were issued by PKA on 3 March 2004 and the Government of Malaysia. G

[14] By a supplemental agreement for additional development works dated 30 November 2005 ('ADWA'), KDSB was appointed the turnkey contractor to, inter alia, design and carry out additional works in the form of junction improvements, electrical infrastructure and a business-class hotel for approximately RM510.3m being the ADWA development costs. H

[15] Subsequently by a further supplemental agreement to the ADWA dated 26 April 2006 ('NADWA'), KDSB was again appointed the turnkey contractor, to inter alia, design and carry out new additional works in the form of electrical infrastructure works for a 33KV and 11KV supply from the Tenaga Nasional Bhd ('TNB') main distribution at Pulau Indah to the project and to Precincts 2 and 8. The NADWA works also comprised a direct access road from I

A the PKFZ project to West Port and a link road from the PKFZ project to West Port CT 4. The total development cost of NADWA was approximately RM335.8m.

B **[16]** The payment for the works under DA1, DA2, ADWA and NADWA together with interests payable thereon was to be deferred in accordance with the terms set out in those agreements.

C **[17]** The relationship between PKA and KDSB was at all times governed by contract. The relationship was one of client and turnkey contractor, respectively. KDSB's obligations were to design, construct and deliver the PKFZ project to PKA in accordance with the design and specifications agreed upon.

D **[18]** There was no restriction in the manner and progress by which KDSB was to undertake the construction of the PKFZ project.

E **[19]** The components of the contracts entered into were merely descriptive of the end product of the works. These contracts are not to be mistaken with a contract entered into between parties based on a bill of quantities.

F **[20]** The components of each contract merely represent the main elements to be constructed and their estimated costs. The notices of payments together with the architect's certificates are indicative of payments based on estimates subject to the main objective of delivery of the PKFZ project as envisaged through the contractual arrangements. The works were completed and delivered on the terms agreed.

G **[21]** It is to be noted that DA1, DA2, ADWA and NADWA are design and build type contracts as opposed to bill of quantities contracts.

[22] Several contractual disputes arose between PKA and KDSB. These contractual disputes translated into several civil suits between the parties which
H suits are still pending.

[23] Between 25 November 2009 till 25 October 2010 the PP seized money and property that were in the custody of the respondents claiming that it had been obtained as a result of or in connection with an offence under s 4(1) of the
I AMLATFA.

[24] A notice of motion dated 23 November 2010 was then filed by the PP pursuant to s 56(1) of the AMLATFA to forfeit the seized property on the basis that the same had been obtained as a result of or in connection with an offence

under s 4(1) of the AMLATFA.

[25] The notice of motion was supported by the affidavit of a deputy public prosecutor ('DPP') Muhammad Saifuddin bin Hashim Musaimi and the affidavits of the police investigating officers Superintendants (Supt) Willey ak Richard and Rajagopal Ramadhass where it was deposed affirmatively that through their investigation it was found that the seized property had been obtained as a result of or in connection with an offence under s 4(1) of the AMLATFA, in that all the property was gained in connection with the commission of the predicate offences under ss 409 (criminal breach of trust) and 420 (cheating) of the Penal Code (Act 574) by the accused Datin Paduka OC Phang, Law Jen Dong, Bernard Tan Heng Swee and Stephen Abok.

[26] The property seized from the first, second, third, fourth, fifth, sixth, seventh, eighth and ninth respondents which were sought to be forfeited are as follows:

(a) the money in the sum of RM30,929.360 in an account No 1554190773 belonging to the first respondent KDSB and the second respondent TMB at OSK Investment Bank Bhd, Level 7, Plaza OSK Jalan Ampang, 50450 Kuala Lumpur, which was seized on 25 November 2009;

(b) the money in the sum of RM48,897.93 in a current account No 2–14231–0003375–8 belonging to KDSB at RHB Bank Bhd, Ground & Mezzanine Floor, Plaza OSK Jalan Ampang, 50450 Kuala Lumpur, which was seized on 25 November 2009;

(c) the money in the sum of RM6,683.66 in a current account No 10–002–001611–0 belonging to KDSB at Affin Bank Bhd, Ground Floor, Menara Affin, No 80, Jalan Raja Chulan, 50200 Kuala Lumpur, which was seized on 8 January 2010;

(d) the money in the sum of RM25,965.71 in a current account No 0018–10–005503–3 belonging to KDSB at EON Bank Bhd, Jalan Raja Laut, 200 Kuala Lumpur, which was seized on 8 January 2010;

(e) a piece of land described as PM, 1621, Lot 26382, Pulau Lumut, Mukim Klang, Selangor owned by the third respondent CSSB which was seized on 31 December 2009

(f) a Bank Islam banker's cheque No 087542 dated 31 December 2009 for the sum of RM1,349,536.26 belonging to the fourth respondent WBASB, which was seized on 31 December 2009;

(g) a EON Bank Bhd banker's cheque No 082944 dated 31 December 2009 for the sum of RM3,650,463.74 belonging to WBASB, which was seized on 31 December 2009;

(h) a Bank Islam banker's cheque No 093416 dated 18 May 2010 for the sum of RM50,000 belonging to WBASB which was seized on 24 May 2010;

(i) the money in the sum of RM 415,059.71 in a current account No 10–002–001616–5 belonging to the fifth respondent WBSB at Affin Bank Bhd, Ground Floor, Menara Affin, No 80, Jalan Raja Chulan, 50200 Kuala Lumpur, which was seized on 8 January 2010;

(j) the money in the sum of RM271,911.11 in a current account No 0018–10–005770–1 belonging to WBSB at EON Bank Bhd, Jalan Raja Laut, 200 Kuala Lumpur, which was seized on 8 January 2010;

(k) a EON banker's cheque dated 10 February 2010 bearing the number 083622 for the sum of RM50,000 belonging to WBSB, which was seized on 10 February 2010;

(l) a EON banker's cheque dated 30 June 2010 bearing the number 087097 for the sum of RM75,000 belonging to WBSB, which was seized on 24 May 2010;

(m) a piece of land described as TL No 017533238, Daerah Kota Kinabalu, Sabah belonging to WBSB, which was seized on 29 May 2010;

(n) the money in the sum of RM545,701.83 in a current account No 10–002–002715–4 belonging to the sixth respondent WBCSB at Affin Bank Bhd, Ground Floor, Menara Affin, No 80, Jalan Raja Chulan, 50200 Kuala Lumpur, which was seized on 8 January 2010;

(o) the money in the sum of RM49,426.11 in a current account No 0018–10–005771–8 belonging to WBCSB at EON Bank Bhd, Jalan Raja Laut, 200 Kuala Lumpur, which was seized on 8 January 2010;

(p) a EON banker's cheque dated 10 February 2010 bearing the number 083623 for the sum of RM316,000 belonging to WBCSB, which was seized on 10 February 2010;

(q) a piece of land described with the grant number PN No 73005, Lot 2434, Seksyen 13, Bandar Shah Alam, Daerah Petaling, Selangor owned by the ninth respondent PKNS, which was seized on 14 May 2010; and

(r) a piece of land described with the grant number PN No 73006, Lot 2434, Seksyen 13, Bandar Shah Alam, Daerah Petaling, Selangor owned by PKNS, which was seized on 14 May 2010.

CAUSE PAPERS FILED AT THE HIGH COURT

[27] For ease of reference, we reproduce the list of cause papers filed at the High Court below namely:

(a) the motion for forfeiture — pp 1–6 record of appeal ('ROA') Vol 3(1);

(b) the appellant's affidavit in support affirmed by deputy public prosecutor ('DPP') Muhammad Saifuddin on 22 November 2010 ('Saifuddin's first affidavit') — pp 7 to 17 ROA Vol 3(1);

(c) the appellant's affidavit in support affirmed by Superintendant (Supt) Willey ak Richard on 22 November 2010 ('Willey's first affidavit') — pp 18–208 ROA Vol 3(2), pp 209–409 ROA Vol 3(3), pp 410–610 ROA Vol 3(4), pp 611–725 ROA Vol 3(5);

(d) the appellant's affidavit in support affirmed by the investigating officer ('IO') Supt Rajagopal a/l Ramadass on 23 November 2010 ('Rajagopal's first affidavit') — pp 726–926 ROA Vol 3(6), pp 927–1127 ROA Vol 3(7), pp 1128–1328 ROA Vol 3(8), pp 1329–1529 ROA Vol 3(9), pp 1530–1730 ROA Vol 3(10), pp 1731–1931 ROA Vol 3(11), pp 1932–2131 ROA Vol 3(12), pp 2132–2332 ROA Vol 3(13), pp 2333–2530 ROA Vol 3(14);

(e) the first, third to sixth respondent's affidavit in reply (1) affirmed by Dato' Faizal bin Abdullah on 22 June 2011 ('Dato' Faizal's first affidavit') — pp 2557–2754 ROA Vol 3(16), pp 2755–2955 ROA Vol 3(17), pp 2956–3156 ROA Vol 3(18), pp 3157–3357 ROA Vol 3(19), pp 3358–3558 ROA Vol 3(20), pp 3559–3759 ROA Vol 3(21), pp 3780–3960 ROA Vol 3(22), pp 3961–4161 ROA Vol 3(23), pp 4162–4362 ROA Vol 3(24), pp 4363–4563 ROA Vol 3(25), pp 4564–4764 ROA Vol 3(26), pp 4765–4965 ROA Vol 3(27), pp 4966–5147 ROA Vol 3(28);

(f) the first, third to sixth respondent's affidavit in reply (2) affirmed by Dato' Faizal bin Abdullah on 24 June 2011 ('Dato' Faizal's second affidavit') — pp 5154–5164 ROA Vol 3(29);

(g) the second respondent's affidavit in reply affirmed by Harvinderjit Singh on 27 June 2011 ('Harvinderjit Singh's first Affidavit') — pp 5165–5186 ROA Vol 3(29);

(h) the eighth respondents affidavit in reply affirmed by the eighth respondent on 27 June 2011 ('law's first affidavit') — pp 5187–5206 ROA Vol 3(29);

(i) the seventh respondents affidavit in reply affirmed by the seventh respondent on 4 July 2011 ('Dato' Seri Tiong's first affidavit') — pp 5207–5225 ROA Vol 3(29);

(j) the first, third to sixth respondent's affidavit in reply (1) affirmed by Idris bin Mat Jani on 12 July 2011 ('Idris's first affidavit') — pp 5226–5346 ROA Vol 3(29);

(k) four separate affidavits in reply (pp 2537–2550 ROA Vol 3(15)) affirmed by Supt Willey ak Richard on 5 August 2011 ('Supt Willey's reply') in reply to Ibrahim bin Surib's first affidavit, Harvinderjit Singh's first affidavit, Dato' Seri Tiong's first affidavit; and Law's first affidavit; and

(l) the appellant's affidavit in reply affirmed by IO Supt Rajagopal a/l Ramadhass on 5 August 2011 ('IO Supt Rajagopal's reply') (pp 2531–2536 ROA Vol 3(15) in reply to Dato Faizal's first affidavit and second affidavit; and Idris's first affidavit.

OUR DECISION

[28] Section 4(1) of the AMLATFA states that money laundering is an offence. An offence of money laundering under sub-s 4(1) is said to have been committed when any person engages in, or attempts to engage in, or abets in the commission of money laundering.

> 4 Offence of money laundering
>
> (1) Any person who —
>
> (a) engages in, or attempts to engage in; or
>
> (b) abets the commission of,
>
> money laundering, commits an offence and shall on conviction be liable to a fine not exceeding five million ringgit or to imprisonment for a term not exceeding five years or both.
>
> (2) A person may be convicted of an offence under subsection (1) irrespective of whether there is a conviction in respect of a serious offence or foreign serious offence or that a prosecution has been initiated for the commission of a serious offence or foreign serious offence.

[29] The word 'money laundering' is defined in s 3 as follows:

> 'money laundering' means the act of a person who —
>
> (a) engages, directly or indirectly, in a transaction that involves *proceeds of an unlawful activity*;
>
> (b) acquires, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes, uses, removes from or brings into Malaysia proceeds of any unlawful activity; or
>
> (c) conceals, disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of any unlawful activity,
>
> where —

(aa) as may be inferred from objective factual circumstance, the person knows or has reason to believe, that the property is proceeds from any unlawful activity; or

(bb) in respect of the conduct of a natural person, the person without reasonable excuse fails to take reasonable steps to ascertain whether or not the property is proceeds from any unlawful activity.

[30] The word 'unlawful activity' is defined in s 3 as follows:

'unlawful activity' means —

any activity which is related, directly or indirectly, to any serious offence or any foreign serious offence.

[31] The word 'proceeds of an unlawful activity' is defined in s 3 as follows:

'proceeds of an unlawful activity' means any property derived or obtained, directly or indirectly, by any person as a result of any unlawful activity.

[32] The word 'property' is defined in s 3 as follows:

'property' means —

(a) assets of every kind, whether corporeal or incorporeal, moveable or immovable, tangible or intangible, however acquired; or

(b) legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including bank credits, traveller's cheques, bank cheques, money orders, shares, securities, bonds, drafts and letters of credits.

[33] From the above definitions it will show that money laundering is principally concerned with the proceeds from an unlawful activity that is any activity which is related directly or indirectly, to any serious offence or any foreign serious offence.

[34] The word 'serious offence' is defined in s 3 as follows:

'serious offence' means —

(a) any of the offences specified in the Second Schedule;

(b) an attempt to commit any of those offences; or

(c) the abetment of any of those offences.

[35] Thus from the definition from s 3 of the AMLATFA, the essence of money laundering is as follows:

(a) first, there must be an '*unlawful activity*' which is any activity that is

related to the pre-defined list of offences provided under the Second Schedule of the AMLATFA. These pre-defined offences are typically known as the *predicate offence*;

(b) secondly, there must be *identifiable proceeds from the said unlawful activity/predicate offence*. These proceeds must be identifiable and specifically and directly connected to the unlawful activity/predicate offence;

(c) thirdly, there must be *an act* associated with money laundering involving the said identifiable proceeds from the unlawful activities/predicate offence. This act is pre-defined under items (a), (b) and (c) of the definition of *'money laundering'*; and

(d) lastly, the requisite *mens rea* associated (which may be inferred from the objective factual circumstance or conduct of a natural person) with the offence of money laundering must be present as set-out under items (aa) and (bb) of the definition of 'money laundering'.

[36] The forfeiture provision, s 56 of the AMLATFA meanwhile states:

56 Forfeiture of property where there is no prosecution

(1) Subject to section 61, where in respect of any property frozen or seized under this Act there is *no prosecution or conviction* for an offence under subsection 4(1) or a terrorism financing offence, the *Public Prosecutor may*, before the expiration of twelve months from the date of the freeze or seize apply to a judge of the High Court for an order of forfeiture of that property *if he is satisfied that such property had been obtained as a result of* or *in connection with* an offence under subsection 4(1) or a terrorism financing offence, as the case may be, or is terrorist property.

(2) *The judge to whom an application is made under subsection (1) shall make an order for the forfeiture of the property if he is satisfied —*

(a) that the property *is the subject-matter of* or *was used in the commission of* an offence under subsection 4(1) or a terrorism financing offence or is terrorist property; and

(b) that there is no purchaser in good faith for valuable consideration in respect of the property.

(3) Any property that has been seized and in respect of which no application is made under subsection (1) shall, at the expiration of twelve months from the date of its seizure, be released to the person from whom it was seized.

(4) In determining whether or not the property has been obtained as a result of or in connection with an offence under subsection 4(1) or a terrorism financing offence or is terrorist property, the court shall apply the standard of proof required in civil proceedings. (Emphasis added.)

[37] Having established the essence of money laundering, we pause to observe that s 56 of the AMLATFA when read together with s 4 of the AMLATFA establishes the necessity for the existence of a predicate offence.

[38] It must be noted that AMLATFA was amended by PU(A) 1467 to Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLATEPUA') which amendment came into effect on the date of publication on 8 August 2014. Though AMLATEPUA came into effect on 8 August 2014, only s 78 came into operation on 8 August 2014 and ss 22 and 26 came into operation on 1 October 2014 through PU(B) 400/2014. The rest of the other provisions amended came into operation on 1 September 2014. With the amendment, s 56 under AMLATEPUA read as follows:

> 56(1) Subject to section 61, where in respect of any property seized under this Act there is no prosecution or conviction for an offence under subsection 4(1) or a terrorism financing offence, the Public Prosecutor may, before the expiration of twelve months from the date of the seizure, or where there is a freezing order, twelve months from the date of the freezing, apply to a judge of the High Court for an order of forfeiture of that property if he is satisfied that such property is —
>
> (a) the subject-matter or evidence relating to the commission of such offence;
>
> (b) terrorist property;
>
> (c) the proceeds of an unlawful activity; or
>
> (d) the instrumentalities of an offence.
>
> (2) The Judge to whom an application is made under subsection (1) shall make an order for the forfeiture of the property if he is satisfied —
>
> (a) that the property —
>
> (i) the subject-matter or evidence relating to the commission of an offence under subsection 4(1) or a terrorism financing offence;
>
> (ii) terrorist property;
>
> (iii) proceeds of an unlawful activity; or
>
> (iv) umentalities of an offence; and
>
> (b) that there is no purchaser in good faith for valuable consideration in respect of the property.
>
> (3) Any property that has been seized and in respect of which no application is made under subsection (1) shall, at the expiration of twelve months from the date of its seizure, be released to the person from whom is was seized.
>
> (4) In determining whether the property is —
>
> (a) the subject-matter of evidence relating to the commission of an offence under subsection 4(1) or a terrorism financing offence;

A (b) terrorist property;

(c) the proceeds of an unlawful activity; or

(d) the instrumentalities of an offence,

the court shall apply the standard of proof required in civil proceedings.

B

[39] As can be seen, before the amendment under AMLATFA, the PP may seize the property under sub-s 56(1) solely on the ground that if he is satisfied that such property had been obtained *as a result of* or *in connection with* an C offence under sub-s 4(1) or a terrorism financing offence, or is a terrorist property. The amended s 56(1) under AMLATEPUA retained these conditions in the new s 56(1)(a) and (1)(b) and added two more conditions for seizure that is, if such property is (c) the proceeds of an unlawful activity or (d) the instrumentalities of an offence. It is to be noted that s 56(1)(a) of the D AMLATEPUA uses different terminology. Instead of 'had been obtained as a result of or in connection with' (as in AMLATFA), the new terminology used is 'the subject-matter or evidence relating to the commission of' such offence.

[40] Similarly, previously before the amendment, under AMLATFA, a judge E to whom an application is made under sub-s (2), shall only make an order for forfeiture of the property if he is satisfied that the property is the *subject-matter of* or *was used in the commission of an offence* under sub-s 4(1) or a terrorism financing offence or is a terrorist property. The amended s 56(2) under AMLATEPUA retained these conditions in the new s 56(2)(a)(i) and (2)(a)(ii) F and added two more conditions for forfeiture, that is, if the property is (iii) the proceeds of an unlawful activity or (iv) the instrumentalities of an offence.

[41] It would seem that the two new conditions added by the amendment (under AMLATEPUA) in allowing the property to be seized or forfeited G respectively on the basis that the property is the proceeds of an unlawful activity or the instrumentalities of an offence, has made the burden thrust upon the PP and the judge lighter or easier in that they are given a further choice under which category the property can be seized or forfeited. Previously under AMLATFA, the PP may only seize property solely on the grounds that if such H property had been obtained as a result of or in connection with an offence under sub-s 4(1) and the judge likewise, shall only order for forfeiture solely on the ground that if the property is the subject-matter or was used in the commission of an offence under sub-s 4(1). But with the amendment under AMLATEPUA there are four categories available and the last two categories, I especially category (c), that the property is the proceeds of an unlawful activity has departed the emphasis of seizure and forfeiture from the attachment of guilt or otherwise on any person under s 4(1) to the emphasis on the legal status of the property itself (see this court's case of *Noor Ismahanum Mohd Ismail v Public Prosecutor* [2018] MLJU 205).

[42] In the context of our present case, as stated earlier, the notice of motion was supported by the affidavit of a deputy public prosecutor ('DPP') Muhammad Saifuddin bin Hashim Musaimi and the affidavits of the police investigating officers Superintendant (Supt) Willey ak Richard and Supt Rajagopal Ramadhass where it was affirmatively deposed that through their investigation, the seized property are the proceeds of an offence under sub-s 4(1) of the AMLATFA, where all the property seized *were gained in connection with the commission of the predicate offences under* ss 409 (criminal breach of trust) and 420 (cheating) of the Penal Code *by the four accused Datin Paduka OC Phang, Law Jen Dong, Bernard Tan Heng Swee and Stephen Abok*. The affidavit of the DPP at paras 31 and 32(iii) is reproduced below:

> 31. *Hasil daripada siasatan* yang dijalankan oleh pegawai-pegawai penyiasat kes AMLATFA dan kes predikat, saya berpuas hati bahawa harta-harta alih dan tak alih yang disita di perenggan 4, 5, 6, 7, 8, 10, 12, 13, 14, 16, 18, 19, 20, 21, 27, 28 dan 29 di atas adalah harta-harta alih dan harta takalih hasil suatu kesalahan di bawah subseksyen 4(1) AMLATFA 2001 yang mana *kesemua harta tersebut telah diperolehi berkaitan kesalahan tipu di bawah* seksyen 420 Kanun Keseksaan.
>
> 32. Saya menyatakan bahawa alasan yang meyokong dapatan itu adalah seperti berikut:
>
> (iii) *saya pohon merujuk merujuk kepada afidavit Superitenden Rajagopal a/l Ramadhass* (No. K/P:G/9912) yang difailkan bersama-sama untuk menyokong permohonan Pemohon ini *mengenai kesalahan yang dilakukan oleh tertuduh-tertuduh dalam kes predikat di bawah* seksyen 409 dan 420 Kanun Keseksaan. (Emphasis added.)

[43] In paras 5 and 6 of Supt Rajagopal Ramadhass affidavit in support affirmed on 23 November 2010, he deposed that Datin Paduka OC Phang (the first accused) had committed criminal breach of trust against LPK's fund to the tune of RM254,850,000 through the claim by KDSB in the performance of the drainage and water supply works and that Law Jenn Dong (the second accused), Bernard Tan Seng Swee (the third accused) and Stephen Abok (the fourth accused) had committed cheating to the tune of RM46,267,000 in their claim on the 33KV electrical system works done and RM76,000 in their claim for works by KDSB. The affidavit of Supt Rajagopal Ramadhass is reproduced below:

> 5. *Hasil daripada siasatan yang saya jalankan menunjukkan Datin Paduka Phang Oi Choo (No K/P: 461205–10–5052) – (selepas ini dirujuk sebagai 'Tertuduh Pertama'), telah melakukan pecah amanah jenayah* ke atas dana LPK berhubung tuntutan bagi perlaksanaan kerja-kerja perparitan dan bekalan air berjumlah RM254,850,000.00 yang dibuat oleh Kuala Demensi Sdn Bhd (selepas ini dirujuk sebagai 'KDSB') di bawah *'Development Agreement'* yang dimasuki antara KDSB dan LPK pada 27 March 2004 yang mana kos bagi kerja-kerja perparitan dan bekalan air telah diserapkan di dalam harga jual beli tanah pada nilaian RM25.00 sekaki persegi

mengikut perjanjian jual beli tanah antara LPK dan KDSB yang dimasuki pada 12.11.2002.

6. *Hasil siasatan menunjukkan Law Jenn Dong* (No K/P: 580714–10–5159) (selepas ini dirujuk sebagai 'Tertuduh Kedua'), *Bernard Tan Seng Swee* (No K/P: 611011–07–5351) (selepas ini dirujuk sebagi 'Tertuduh Ketiga') serta *Stephen bin Abok* (No K/P: 580617–12–5609) (selepas ini dirujuk sebagai 'Tertuduh Keempat') *telah melakukan penipuan* bersabit tuntutan bagi kerja-kerja sistem elektrik 33 kilovolts berjumlah RM46,267,000.00 di bawah 'Additional Development Work Agreement' yang dimasuki antara LPK dan KDSB pada 30.11.2005 dan tuntutan bagi kerja- kerja 33 kilovolts supply ke Presint 2 dan Presint 8 di PKFZ berjumlah RM76,000,000.00 di bawah 'New Additional Development Works Agreement' yang dimasuki antara LPK dan KDSB pada 26.4.2006. (Emphasis added.)

[44] In the context of the present application, the grounds of seizure by the PP are specific in that it is premised on the basis that the property seized, as deposed by the DPP and Supt Rajagopal Ramadhass, were gained from the commission of the predicate offences under ss 409 and 420 of the Penal Code by the four accused. The DPP in his submission further argued that since after investigation all these four people had been subsequently charged under ss 409 and 420 of the Penal Code which offences are serious offences specified in the Second Schedule to the AMLATFA, as such, on that basis, the prosecution had on a balance of probabilities, satisfied the court that an offence under s 4(1) of the AMLATFA has been committed by Datin Paduka OC Phang, Law Jenn Dong, Bernard Tan Seng Swee and Stephen Abok (p 38 of the DPP's submission).

[45] From the DPP's submission, it is clear that he has identified the property seized as the proceeds from the predicate offences committed by the four accused.

[46] The scenario is different under sub-s 56(1) of the AMLATEPUA. The PP may seize the property if he is satisfied that any one of the four conditions as in (a), (b), (c) or (d) are met. He is not encumbered as under AMLATFA to show that his satisfaction must rest solely on the fact that the property had been obtained as a result of or in connection with an offence under sub-s 4(1).

[47] Likewise, under sub-s 56(2) of the AMLATEPUA. The judge shall make an order for forfeiture if he is satisfied that any one of the four conditions in (a), (b), (c) or (d) are met. The judge is not encumbered as under AMLATFA to show that his satisfaction must rest solely on the fact that the property is the subject-matter or was used in the commission of an offence under sub-s 4(1). As stated earlier, the introduction of the other two conditions in s 56(1) and (2) of AMLATEPUA, especially category (c) has made the burden thrust upon the

PP and the judge to seize or to forfeit respectively, lighter or easier in that the emphasis is no longer on the attachment of guilt or otherwise of any person under s 4(1) but instead on the legal status of the property itself.

[48] It must be stressed that the grounds upon which the application is premised and the affidavit/s in support of the application plays a pivotal role in determining under which category the PP and the judge sought to seize or forfeit the property respectively under AMLATEPUA. As the application in our instant case is under AMLATFA and not AMLATEPUA and the DPP's contention is that the prosecution had on a balance of probabilities satisfied the court that an offence under s 4(1) of the AMLATFA has been committed by Datin Paduka OC Phang, Law Jenn Dong, Bernard Tan Seng Swee and Stephen Abok, then the prosecution has to prove its contention before it can succeed in its application.

[49] Section 70 of the AMLATFA reads as follows:

> 70 Standard of proof
>
> (1) Any question of fact to be decided by a court in proceedings under this Act shall be decided on a balance of probabilities.
>
> (2) Subsection (1) shall not apply in relation to any question of fact that is for the prosecution to prove in any proceedings for an offence under this Act or any subsidiary legislation under it.

[50] Section 70(2) recognises that when it comes to proving an offence under AMLATFA or any subsidiary legislation under it, the burden on the prosecution must be beyond a reasonable doubt. Section 70(1), on the other hand, provides that the standard of proof on any question of fact to be decided by a court in proceedings under AMLATFA is on a balance of probabilities.

[51] Since the PP's application for forfeiture is solely premised on the fact that the property seized from the respondents were gained in connection with the commission of the predicate offences under ss 409 (criminal breach of trust) and 420 (cheating) of the Penal Code by the four accused Datin Paduka OC Phang, Law Jen Dong, Bernard Tan Heng Swee and Stephen Abok; the PP thus has to show that the property seized has been obtained *as a result of* or *in connection with* an offence under sub-s 4(1). In fact since the DPP in his submission had argued that the prosecution had on a balance of probabilities satisfied the court that an offence under sub-s 4(1) of the AMLATFA has been committed by Datin Paduka OC Phang, Law Jenn Dong, Bernard Tan Seng Swee and Stephen Abok, he has to show how this is so.

[52] According to *Words, Phrases & Maxims Legally & Judicially Defined* 'as a result of' means 'to arise or proceed as a consequence from the actions,

A circumstances, premises, etc' or 'arise as an actual consequence or follow as a logical consequence'.

[53] According to *R v Ward, Marles & Graham* [1989] 1 Qd R 194 *'in connection with'* means:

B

> there must be a substantial connection between the money and the offence — not a mere accidental or incidental connection with the commission of that offence. There must therefore be in a very real sense a substantial connection between the use of the property and the actual commission of the offence in the sense that THE commission of the offence is related to or, is dependent upon or could not have been committed without or resulted directly from the use of the property.

C

[54] Subsequently the court in determining whether the property are the subject-matter of or was used in the commission of an offence under sub-s 4(1)(a) shall apply the standard of proof required in civil proceedings or as we know it, on a balance of probabilities. This is provided for in ss 56(4) and 70(1) of the AMLATFA. As such the forfeiture proceeding under s 56 can be deemed to be a civil forfeiture proceeding.

D

E

[55] In the circumstances of our instant case the specific proceeds from the said predicate offences under ss 409 and 420 of the Penal Code which offences the PP alleged were committed by the four accused must be linked to the offence of money laundering. This is crucial and is a prerequisite to s 56(2) since the judge has to be satisfied that the property is the subject-matter or was used in the commission of an offence of money laundering before he can make an order for forfeiture under the AMLATFA.

F

[56] Following from the above, and the affirmative deposition made by the PP in our instant case, it is incumbent upon the PP to make clear to this court, in its application for forfeiture under s 56 of the AMLATFA the following elements:

G

(a) the existence of a predicate offence, the evidence and basis upon which the commission of the offence has been established;

H

(b) identify the proceeds or 'the subject-matter of' the predicate offences that are in the custody of the respondents; and

(c) since the DPP has admitted that the four accused had committed money laundering, then in what manner the respondents have abetted them.

I

THE FINDINGS MADE BY THE HIGH COURT

[57] The High Court findings are as follows:

(a) for a s 56 application to succeed, the predicate offence must be explained and proven and it must be linked to the offence of money laundering under s 4(1) of the Act. The phrase 'in connection' pursuant to s 56 must necessarily mean a 'substantial connection' between the property sought to be forfeited and the predicate offence (paras 22–24 of judgment);

(b) the predicate offence must be proven beyond a reasonable doubt (para 25);

(c) there must be a link between the property sought to be forfeited and the offence of money laundering (para 25);

(d) the respondents must directly or indirectly be involved in the offence of money laundering with the necessary element of mens rea (para 25);

(e) there is a violation in respect of art 13 of the Federal Constitution if the property is forfeited by the PP not in accordance with law (paras 29 and 37);

(f) the PP was guilty of suppression of evidence (paras 31–32 and 34);

(g) there is no proof that the money and property sought to be seized were 'unclean money' obtained from unlawful activity. The money was paid to the respondents through a funding exercise, the legality of which, has not been questioned since it was approved by PKA and supported by the necessary architect certificates. If there are unlawful payments as a result of illegal works, the clean and unclean money would have been mixed together and it is for the PP to differentiate them (paras 35–36);

(h) the internal workings of PKA are not within the respondents knowledge and if Datin Paduka OC Phang had acted beyond her authority it will not be within the knowledge of the respondents (para 39);

(i) a full trial is preferable than affidavit evidence in an application under s 56 since it is a criminal application and any affidavit filed has to be in accordance to s 424 of the Criminal Procedure Code ('the CPC') (paras 43–45);

(j) ss 56(1) and (2) stated that the appellant/PP and the judge has to be satisfied ('if he is satisfied'), and in this the PP has only brought affidavit evidence without any documentary evidence which is insufficient to satisfy the judge no matter what standard of proof is required ('tanpa mengira apakah 'standard of proof' yand dikehendaki') (para 42); and

(k) the PP had failed to fulfill the requirements/conditions of s 56 of the AMLATFA by adducing insufficient evidence which was in any event inadmissible because it was hearsay evidence (paras 42–50).

A WHETHER THE REQUIREMENTS FOR THE FORFEITURE OF THE PROPERTY UNDER SECTION 56 HAVE BEEN FULFILLED BY THE PROSECUTION (GROUNDS 1, 8, 9, 10, 11, 12, 18, 19, 20, 21, 22, 23, 24, 25, 40 AND 41)

B **[58]** The PP submits that the learned judge erred in law and/or in fact when he held that the prosecution had failed to establish the ingredients of forfeiture of the property under s 56 of the AMLATFA.

C **[59]** It must be noted that s 56 is two pronged. Before the PP can make an application for forfeiture to a High Court judge, the PP has to meet the requirements or conditions of s 56(1) of the AMLATFA. The conditions are that there is no prosecution or conviction for an offence under sub-s 4(1) in respect of the property frozen or seized and that the application has to be made before the expiration of twelve months from the date of the seizure, or where D there is a freezing order, twelve months from the freezing. Further, the PP has to be satisfied that the property had been obtained as a result of or in connection with an offence under sub-s 4(1) or a terrorism financing offence or terrorist property before he can make such an application. In our instant case the last two conditions whether the property is in connection with a terrorism E financing offence or a terrorist property is not relevant. What is relevant here is whether the property had been obtained as a result of or in connection with money laundering.

F **[60]** Likewise, once the application is before the learned judge, the learned judge shall make an order for the forfeiture of the property under s 56(2), *if he is satisfied* that:

(a) *the property is the subject-matter or was used in the commission of an offence* under sub-s 4(1) or a terrorism financing offence or is a terrorist property; G and

(b) *that there is no purchaser in good faith for valuable consideration* in respect of the property.

H In determining condition (a) the learned judge shall apply the standard of proof as required in civil proceedings or in other words, the standard of proof on a balance of probabilities.

I **[61]** Let us now look whether all the conditions were met when the PP made its application under s 56(1). From the facts, though the property was seized under AMLATFA, the application was not made within the prescribed time, that is, before the expiration of 12 months from the date of seizure. Further, there was no prosecution or conviction under s 4(1) of the AMLATFA though there were prosecution of four accused under the predicate offence under ss

409 and 420 of the Penal Code. As submitted by counsel for the ninth respondent Encik Shamsul Sulaiman, s 56 can be resorted to in two situations, either:

(a) there is no prosecution but an offence is realised but no suspect was discovered. In other word the proceeds from the offence can be identified but not the offender; or

(b) there is prosecution but due to insufficient evidence, there is no conviction.

[62] DPP Faisal admitted to us that s 56 has generally been resorted to in the past only in cases where there had been no prosecution preferred against anyone under s 4(1) of the AMLATFA or under any predicate offences. It has never been resorted to in a situation where, as in our instant case, there had been a prosecution of an accused under a predicate offence. This according to DPP Faizal is the first time that the PP had resorted to this section, when at the time of making such an application to the judge under s 56(2), four accused had already been charged under ss 409 and 420 of the Penal Code.

[63] It is a fact, undisputed, that all the nine respondents had not been prosecuted either under s 4 of the AMLATFA or under any of the predicate offences. Be that as it may, four accused were charged under ss 409 and 420 of the Penal Code. The offences under ss 409 (criminal breach of trust) and 420 (cheating) are considered as serious offences as defined in s 3 of the Second Schedule of the AMLATFA and since money laundering under s 4 is principally concerned with the proceeds from an unlawful activity which activity constitute a serious offence, the proceeds from the commission of the offences under ss 409 and 420 of the Penal Code are what the PP wants the learned judge to forfeit, that is, if the PP can satisfy the learned judge that these proceeds in the custody of the respondents (as claimed by PP) are the subject-matter or was used in the commission of the offences under ss 409 and 420 of the Penal Code.

[64] It must be noted that the charge under s 409 against Datin Paduka OC Phang has been withdrawn and that Law Jenn Dong, Bernard Tan and Stephen Abok has been acquitted of the charges under s 420 at the end of prosecution without their defence being called. In such circumstances how can the PP establish that the property seized had been obtained as a result of or in connection with the offences under ss 409 or 420 or connected with an offence of money laundering (as submitted by the DPP) committed by the four accused under sub-s 4 of the AMLATFA.

[65] As regards to whether there is any claim from any purchaser in good faith for valuable consideration, s 61 read as follows:

61 Bona fide third parties.

(1) The provisions in this Part shall apply without prejudice to the rights of *bona fide third parties*.

(2) The court making the order of forfeiture under section 55 or the judge to whom an application is made under subsection 56(1) shall cause to be published a notice in the Gazette calling upon any third party who claims to have any interest in the property to attend before the court on the date specified in the notice to show cause as to why the property shall not be forfeited.

(3) A third party's lack of good faith may be inferred, by the court or an enforcement agency, from the objective circumstances of the case.

(4) The court or enforcement agency shall return the property to the claimant when it is satisfied that —

(a) the claimant has a legitimate legal interest in the property;

(b) no participation, collusion or involvement with respect to the offence under subsection 4(1) or a terrorism financing offence which is the object of the proceedings can be imputed to the claimant;

(c) the claimant lacked knowledge and was not intentionally ignorant of the illegal use of the property, or if he had knowledge, did not freely consent to its illegal use;

(d) the claimant did no acquire any right in the property from a person proceeded against under circumstances that give rise to a reasonable inference that any right was transferred for the purpose of avoiding the eventual subsequent forfeiture of the property; and

(e) the claimant did all that could reasonably be expected to prevent the illegal use of the property.

[66] On 23 March 2011, a notice in the *gazette* unders 61(2) of the AMLATFA was published, which called upon any third party who claims to have any interest in the property to attend the court to show cause as to why the property shall not be forfeited.

[67] On 19 April 2011, no third party attended the court to claim the property. The first to the ninth respondents were already made parties under the s 56 application since they were served with the application. The respondents claimed that they are the legal owners of the property and not third parties. Be that as it may, the mandatory requirement to publish the notices in the *gazette* calling any third party who claims to have any interest in the property to attend before the court on the date specified in the notice to show cause as to why the property shall not be forfeited was fulfilled. With that the motion is set for the learned Judge, if he is satisfied, to forfeit the property.

[68] The learned judge under s 56(2), as stated earlier, has to be satisfied that the property is the subject-matter of or was used in the commission of an offence under s 4(1) before he shall make an order to forfeit them. There are two parts that the PP has to establish to the satisfaction of the judge that is:

(a) the property is the subject matter of; or

(b) was used in the commission of an offence of money laundering.

It must be reiterated again that the PP's ground for application under s 56 of the AMLATFA was premised on the fact that Datin Paduka OC Phang, Law Jenn Dong, Tan Seng Swee and Stephen Abok had committed the serious or predicate offences under ss 409 and 420 of the Penal Code and since the four accused had committed these offences, the PP had on a balance of probabilities, satisfied the court that an offence under 4(1) of the AMLATFA had been committed by them.

WHETHER THE CONDITIONS IN S 56 OF THE AMLATFA HAS BEEN ESTABLISHED

[69] It is trite law that an application made under s 56 of the AMLATFA requires proper proof of relevant facts which in turn must be supported by admissible evidence (refer *Public Prosecutor v Thong Kian Oon & Ors* [2012] 10 MLJ 140; [2012] 8 CLJ 119). This is to enable the court to arrive at a correct decision since the court is not merely exercising a ministerial or executive character when adjudicating a s 56 application.

[70] From our perusal, we find that the PP through the investigating officers merely produced via their affidavits allegations of facts and charges brought against third parties (Datin Paduka OC Phang, Law Jhen Dong, Bernard Tan and Stephen bin Abok) who have all been acquitted and discharged.

[71] At the same time, the PP had failed to disclose and provide the names, identity and sources of information that they had received and relied upon and the reasons for their belief in such information and the involvement of each of the respondents to these charges. This is relevant since the PP had submitted that the four accused on a balance of probabilities had committed money laundering. If the four accused had committed money laundering, then in what manner has all the respondents abetted them.

[72] The investigating officers have also failed to disclose all of the documents relied upon by them in coming to their conclusions or as to their reasons for having relied on the documents as being a true reflection of the facts alleged.

[73] Accordingly, it is impossible for the PP to have 'been satisfied' that the bringing of the application was appropriate, under the circumstances. The PP should have set out in Saifuddin's first affidavit the evidence that he relied on to 'satisfy himself' that:

(a) there are predicate offences committed by the four accused; and

(b) that the proceeds derived therefrom had been used in the commission of an offence of money laundering.

[74] Further, in the first affidavit of IO Supt Rajagopal, he merely relies on the allegations in the police report in exh RG1 (pp 742–750 of record of appeal ('ROA') Vol 3(6)) lodged by Datuk Lee Hwa Beng to conclude that the predicate offences under s 409 of the Penal Code has been made out against Datin Paduka OC Phang, and the predicate offence under s 420 of the Penal Code has been made out against Law Jenn Dong, Bernard Tan Seng Swee and Stephen bin Abok.

[75] It is not disputed, as stated earlier, that the PP has conceded that *no charges are being preferred against any of the respondents* for an offence under s 4(1) of the AMLATFA. The said decision was arrived at after the PP had scrutinised all of the investigation papers referred to in Saifuddin's first affidavit, Supt Rajagopal's first affidavit and Willey's first affidavit.

[76] In this regard, the only averment that the PP maintains and said repeatedly is that charges have been preferred against Datin Paduka OC Phang, Law Jenn Dong, Bernard Tan Seng Swee and Stephen bin Abok. The charges were not exhibited in the affidavits but were merely appended with the written submission of the PP.

[77] It is important to note, as stated earlier, that the charges against Datin Paduka OC Phang were withdrawn by the PP and the sessions court had ordered the acquittal and discharged of Datin Paduka OC Phang.

[78] Further, the sessions court had not called upon the defence and had acquitted and discharged Law Jenn Dong, Bernard Tan Seng Swee and Stephen bin Abok on 17 March 2017.

[79] It is thus insufficient for the PP to say, that just because the four accused had been charged, that in itself without more, is sufficient to establish that on a balance of probabilities, an offence of money laundering under sub-s 4(1) of the AMLATFA had been committed by them.

[80] Further, we agree with the High Court judge that the PP has also failed to identify the nature and extent of the participation of the respondents with

the offence of money laundering. Since the PP has argued that the four accused had committed money laundering, the PP has also failed to show in what manner the respondents has abetted the four accused.

[81] In this context, IO Supt Rajagopal has not tendered any other substantive evidence to support his findings that an act of money laundering has been made out under items (a), (b) and (c) of the definition of money laundering under s 3 of the AMLATFA. IO Supt Rajagopal has also not laid down the factors which give rise to the inference of intent or mens rea as described in items (aa) and (bb) of the definition of money laundering under s 3 of the AMLATFA.

[82] Instead, in his affidavit, IO Supt Rajagopal, simply begins most of his averments by saying that 'my investigation reveal that ...'. IO Supt Rajagopal, also does not describe whose statements were taken as part of his investigation and what were the effect and purport of the said statements. IO Supt Rajagopal, also has failed to tender or describe the nature and contents of any of the statements that he recorded under the AMLATFA.

[83] The situation would have been different had the PP adduced the statements that were recorded to prove the predicate offence under s 32(2) of the AMLATFA which reads as follows:

31 Power of an investigating officer

(1) Where an investigating officer is satisfied, or has reason to suspect, that person has committed an offence under this Act, he may, without a search warrant —

(a) stop, enter, board, inspect, detain and search any conveyance for any property, document or information;

(b) enter, inspect and search any premises belonging to or in the possession or control of the person of his employee, and in the case of a body corporate, its director or manager for any property, document or information;

(c) break open, examine and search any article, container or receptacle found in any premises or conveyance that is being searched;

(d) detain, take possession of, and remove from the premises or conveyance any property, document or information found in the premises, conveyance, article, container or receptacle. And detain it for such period as he considers necessary;

(e) inspect, make copies of or take extracts from any document or information so detained;

(f) search any person who is in, or on, such premises or conveyance, if the investigating officer has reason to suspect that the person has on

A his person any property, document or information, including personal documents, which in the opinion of the investigating officer are necessary for the purpose of an investigation into an offence under this Act and detain anything found on such person.

B (2) An investigating officer may order, orally or in writing, any person whom he believes to be acquainted with the facts and circumstances of the case —

(a) to attend before him for examination;

(b) to produce before him any property, document or information; or

C (c) to furnish to him a statement in writing made on oath or affirmation setting out such information as he may require.

[84] The question of privilege and any risks of disclosure causing any danger to the person giving any statement under s 32(2) of the AMLATFA does not D arise since there is no prosecution in the first place of any of the respondents. Hence the references made by the PP to authorities such as *Husdi v Public Prosecutor* [1979] 2 MLJ 304 (HC) and *Husdi v Public Prosecutor* [1980] 2 MLJ 80 (FC), *Public Prosecutor v Dato' Seri Anwar bin Ibrahim* [2010] 2 MLJ E 353; [2010] 4 CLJ 331 (CA) is not relevant as those cases concerned applications made by an accused person for statements recorded under s 112 of the CPC in ongoing criminal trials.

[85] In the present case, as stated earlier, it is not disputed that none of the F respondents were charged for any offences. At the same time, as stated earlier, cha rges preferred against others such as Datin Paduka OC Phang were withdrawn while Law Jenn Dong, Bernard Tan Seng Swee and Stephen bin Abok were acquitted. Thus, there is no danger arising of any of the statements recorded being revealed as evidence in court.

G

EVALUATION OF THE IO SUPT RAJAGOPAL'S, AFFIDAVIT EVIDENCE (FIRST AFFIDAVIT) ON DRAINAGE AND WATER SUPPLY WORKS TO SHOW THAT A PREDICATE OFFENCE HAS BEEN COMMITTED

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[86] In para 5 of his affidavit, IO Supt Rajagopal, states that his investigations reveal that Datin OC Phang committed a criminal breach of trust in dealing with PKA's funds in connection with KDSB's claim in the sum of RM254,850,000 paid for drainage and water supply works.

I

[87] At para 14, the IO Supt Rajagopal, says that Datin Paduka OC Phang also acted beyond her authority.

[88] At para 8, the IO Supt Rajagopal, says that his investigations confirmed

that the drainage and water supply works were covered under the SPA for the sum of RM45,730,074.30 which has in fact been paid and as a result suggesting that there has been an overpayment;

[89] In para 17, the IO Supt Rajagopal, says that Datin Paduka OC Phang has been charged under s 409 of the Penal Code.

[90] In essence, in paras 8 to 17 of IO Supt Rajagopal's, affidavit *at pp 730–733 of ROA Vol 3(6)*, IO Supt Rajagopal is saying that the cost of these works were supposed to have been covered under the SPA and capped at RM45,730,074.30 and that KDSB is not entitled to claim the sum of RM254,850,000 under DA1/DA2 because these works were absorbed under the SPA.

[91] In other words, IO Supt Rajagopal, is saying that there *has been a double claim for the same works*. As evidence, IO Supt Rajagopal, relies on the variation order in exh RG8 (pp 866–869 of ROA Vol 3(6)), the SPA, DA1, DA2 and the notices of payment for the drainage and water supply works.

[92] With respect we are unable to agree with the above position for the following reasons.

[93] Under the SPA dated 12 November 2002, KDSB sold the land to PKA. Payments by PKA to KDSB were deferred from 30 June 2007–30 June 2012. KDSB was obliged to undertake certain basic infrastructure works, which also encompassed the construction of 10,865 meter monsoon drain, two monsoon drain outlets and one RC box culvert under the SPA (Schedule 1 of the SPA). KDSB completed these works.

[94] Under DA1, KDSB was required to develop 400 acres of the land at an estimated cost of RM400m (Phase 1). This was a design and build development contract. The defining characteristics of this type of contract are that the essential tasks of a project are combined: the contractor will undertake design, procurement, manufacture, fabrication, production and construction in a single package.

[95] One of the components under DA1 was that KDSB had to make proper provision for drainage of surface water from the land that was being developed (5.1(h)) of DA1. This encompassed the construction of monsoon drains and a complete water supply system to cater for Phase 1 of the development. Clearly this did not fall under the SPA.

[96] In any event, there cannot be a double claim because as long as KDSB

developed Phase 1 of the project at the costs agreed upon, it has discharged its obligations under the contract. It is not for PKA or any other party to question how much of the contract sum was spent on a particular component of the works undertaken under a design and build contract.

[97] Under DA2, the development *was increased to one thousand (1,000) acres* at an estimated cost of RM1 billion. This was on the recommendation of PKA's Consultants and Managers, JAFZI.

[98] JAFZI recommended that the development be undertaken in a single phase to reduce development costs by eliminating one set of mobilisation and demobilisation costs. The variation order was brought about as a result of the recommendation of JAFZI dated 8 November 2003 (exh 9(c)) (pp 4691–4692 of ROA Vol 3(26)), who is an independent non-partisan body. On 24 October 2003 JAFZI was appointed by PKA as its:

(a) project consultant for approximately USD430,000 (exh (9a)) (pp 4628–4664 of ROA Vol 3(26)); and

(b) project manager for approximately USD3,800,000 (exh 9(b)) (pp 4666–4689 of ROA Vol 3(26)).

[99] As a result, the specifications to the three components, namely the monsoon drains, water supply and bridges had to be changed to cater for 1,000 acres.

[100] By a letter dated 3 November 2004 (exh 9(d)) (pp 4694–4695 of ROA Vol 3(26)), PKA confirmed that the specifications for the said components had been changed, the details of which are as follows:

(a) the width of the drainage had to be increased from 3.5 meters to 8 meters;

(b) the monsoon drain outlets had to be increased from a 10 meters width to a 20 meters width;

(c) the piping had to be enlarged to cater for 10 meters gallons per day as opposed to the original 1.3 meters gallons; and

(d) the original 2RC structure bridge had to be converted to box culverts.

[101] KDSB completed the three components based on the revised specifications.

[102] PKA then confirmed that in order to determine the delivery date for the SPA, PKA will deem the works as 100% complete under the SPA when the value of the works for the three components (based on the revised specifications) exceed RM45m. This was done on 3 November 2004 to ensure

that there were no two separate concurrent contracts with differing specifications (exh 9(e)) (pp 4697–4699 of ROA Vol 3(26)). A

[103] From the facts elucidated above, it is obvious that IO Supt Rajagopal, was not aware and/or did not appreciate the effect of the relevant material facts and evidence prior to lodging his police report in exh RG38 (pp 2528–2530 of ROA Vol 3(14)) where he said that *'he believes' that the offence of money laundering has been committed because he had failed to sufficiently appreciate the material facts governing the contractual relationship between KDSB and PKA,* the details of which are as follows: B C

(a) the scope of work concerning the drainage and water supply work under the SPA were specific and basic (Schedule 1 at p 70 of exh 3a at pp 2712–2753 of ROA Vol 3(16)) of Dato' Faizal's first affidavit);

(b) the scope of the drainage and water supply work under DA1 was much wider then that under the SPA (exh 3b (pp 2755–2801 of ROA Vol *3(17)*) of Dato' Faizal's first affidavit); D

(c) works initially undertaken under DA1 were then found to be redundant as a result of PKA's decision (relying on JAFZI's proposal) to have the development undertaken in 1 single phase comprising of 1,000 acres; E

(d) in a design and build type contract, it is immaterial how much money is charged for a particular component of work as long as the end result meets the requirements of delivery under the said contract; and

(e) all the arrangements between the parties were contractual and payments were made on the architects certificates and notices of payments that were valid and binding. F

[104] IO Supt Rajagopal says that Datin Paduka OC Phang who is the Managing Director of Lembaga Pelabuhan Kelang ('LPK') did not have the power to issue the variation order unless she obtained the prior approval of PKA Pilgrim Board, which IO Supt Rajagopal alleges was not done. As a result, IO Supt Rajagopal concludes in para 17 of his affidavit that Datin Paduka OC Phang had committed a criminal breach of trust. He further goes on to say that she has subsequently been charged under s 409 of the Penal Code for the offence of committing a criminal breach of trust by a public servant or agent. G H

[105] However, the PP have withdrawn the charges under s 409 against Datin Paduka OC Phang and in withdrawing the predicate/serious offence, the PP is deemed to have admitted that there is no predicate/serious offence that has been established to warrant an application to be made to the learned judge for the forfeiture of the property. In other words, by withdrawing the charges, the premise of the application under s 56 for forfeiture by the PP that there is an offence under sub-s 4(1) of the AMLATFA due to the commission of the I

predicate offence under s 409 of the Penal Code by Datin Paduka OC Phang falls or cannot stand.

THE INTERNAL WORKINGS OF PKA ARE NOT WITHIN THE RESPONDENTS KNOWLEDGE

[106] It is also pertinent to note that both parties (PKA and KDSB) at all times were acting under the advice of solicitors. When the notices of payments were issued, it was paid. There were no reasons for KDSB to suspect that Datin Paduka OC Phang had acted beyond her authority, if at all.

[107] On this point, we agree with the High Court that it is not for KDSB to verify PKA's internal procedure in the issuance of the variation order. This would constitute interference with the internal workings of PKA, something which is in conflict with the principle that the internal affairs of a company should not be interfered with. Refer *Hew Sook Ying v Hiw Tin Hee @ Hew Hee* [1992] 2 MLJ 189; [1992] 3 CLJ 1325 (SC).

EVALUATION OF IO SUPT RAJAGOPAL'S AFFIDAVIT EVIDENCE (FIRST AFFIDAVIT) ON 33KV ELECTRICAL INFRASTRUCTURE WORK TO SHOW THAT A PREDICATE OFFENCE HAS BEEN COMMITTED

[108] IO Supt Rajagopal alleges that these works were never carried out. Apart from this statement, no reasons were given except that TNB did not approve these works. The evidence adduced by the respondents on the other hand shows:

(a) the scope of works under the ADWA undertaken by KDSB on a turnkey basis was made up of 33KV works, 11KV works, 415V LV supply works and road crossings at a contract price of RM135m;

(b) PKA and the Government of Malaysia approved the contract for electrical infrastructure works to be undertaken by KDSB;

(c) under the terms of the NADWA, KDSB agreed to carry out amongst others, electrical works for 33KV supply to Precinct 2 and Precinct 8 together with the civil and infrastructure works;

(d) in complying with its obligation under the ADWA and the NADWA, KDSB carried out its obligations to the extent possible and this included purchasing the cables and doing certain infrastructure works and ducting for the purposes of laying the cables. If KDSB did not undertake these works it would have been in breach of these contracts;

(e) the cables were purchased from a TNB's approved vendor and TNB did in fact inspect the cables jointly with KDSB prior to purchase. These cables were delivered to KDSB (exh 10(b) at pp 4705–4708 of ROA Vol *3(26)*);

(f) to date, save for the mere laying of the cables together with the installation of the transformers and the switchboards, all the other works with respect to the 33KV have been completed. KDSB is unable to complete these works until the issue with TNB is resolved. Further KDSB has not been paid in full for the 33KV works;

(g) in December 2005, TNB as the utility provider insisted on undertaking the 33KV works itself. Negotiations took place between PKA, KDSB and TNB until 2009 in an attempt to resolve this issue. No agreement was reached. Negotiations halted after investigations commenced into Lee Hwa Beng's police report; and

(h) In the event PKA is able to secure the approval from TNB for the remaining works, these remaining electrical works can be undertaken and completed within the contract sum that remains unpaid.

WEIGHT TO BE ATTACHED TO IO SUPT RAJAGOPAL'S AFFIDAVIT EVIDENCE

[109] As a whole, we find that there are glaring omissions in the affidavit of IO Supt Rajagopal which could have been easily identified namely:

(a) JAFZI was the project consultants and managers;

(b) the variation letter came about as a result of JAFZI's recommendation that the development be undertaken as a whole and not in two separate phases which led to the scope of works being enlarged;

(c) at all times KDSB only undertook works that PKA and the Government of Malaysia instructed it to do;

(d) the scope of the drainage and water supply works under the SPA were basic and general and were in place as a result of the previous development order that KDSB secured over the land; and

(e) KDSB had already made the purchase of all the cables and done all the work towards completion of the 33KV electrical infrastructure work under ADWA and NADWA. TNB had knowledge of this as the purchase of the cables was from a TNB nominated subcontractor.

THE APPELLANT/PP WAS GUILTY OF SUPPRESSION OF EVIDENCE

[110] We pause to note that we do not agree with the High Court that IO Supt Rajagopal is guilty of any suppression of evidence. What is however apparent is non-disclosure of facts on his part. While we do not wish to question the motives behind the non-disclosure of the above facts by IO Supt Rajagopal, we find such non-disclosure fatal to the PP's case since it is trite law that failure on the part of the appellant/PP to provide full disclosure about the entirety of certain matters is fatal to their case (refer *Pendakwa Raya v Raja bin Sharif* [2009] MLJU 466; [2009] 1 LNS 509).

EVALUATION OF SUPT WILLEY'S AFFIDAVIT EVIDENCE (FIRST AFFIDAVIT) THAT THE RESPONDENTS USED, ACQUIRED AND/OR POSSESSED THE PROCEEDS FROM THE PREDICATE OFFENCE

[111] Supt Willey first affidavit merely sets out the movement of money from KDSB's and TMB's account/s to various other account/s. There is no proof that the money sought to be seized and forfeited were from the subject-matter of or was used in the commission of the offence of money laundering or that they are connected to the two predicate offences under ss 409 and 420 of the Penal Code.

[112] The PP has tendered no evidence to prove, on the balance of probabilities, that the money and property sought to be forfeited, is in fact the proceeds from the predicate offences.

[113] The only works that the PP has raised issue with are the drainage and water supply works and the 33KV electrical infrastructure works. The payment for the said works were made by the funders from the funders pool of monies as a result of the architects certificate, notices of payment and letters of consent by PKA ('the documents in support of payments') (exh 4(a), 4(b) and 4(c) (pp 2859–3836 of ROA Vol *3(17)–3(22)*) of Dato Faizal's first affidavit).

[114] The point to be made here is that pursuant to the documents in support of payments, these payments were made for a variety of works and not only the alleged impugned works complained off. The PP failed to establish that the money and property sought to be forfeited is 'as a result of' or 'connected with' the offence of money laundering.

REBUTTAL BY THE RESPONDENTS

[115] The respondents, on the other hand, have tendered evidence to prove that the money received for the drainage and water supply and electrical works

complained of was paid to KDSB from the funders pool of monies, over time, from 2004–2008.

[116] The source documents for the funding exercise have been disclosed. As stated by the learned judge, which we find no reason to disagree with, the legality of the funding exercise is not in dispute.

[117] It is a fact that all these money were mixed together with other money and are obviously no longer in the account of KDSB. The money paid to KDSB for the drainage and water supply works and the 33KV electrical works are mixed together with other money legitimately earned under DA1, DA2, ADWA, NADWA and various other development contracts undertaken by WBSB and WBCSB.

[118] It has to be pointed out that IO Supt Rajagopal's complaints relate to money that were paid to KDSB from 2004–2008. It is not possible to identify these money and then separate them from all the other money legally earned under these contracts and other contracts over the years.

[119] For the reasons mentioned above, it is clear that the PP has not established, on a balance of probabilities, that the money and property seized had been obtained as a result of or in connection with an offence under sub-s 4(1) of the AMLATFA.

[120] On the other hand, the respondents have succeeded in establishing that:

(a) the predicate offence has not been established at all;

(b) an act of money laundering has not been made out under items (a), (b) and (c) of the definition of money laundering under s 3 of the AMLATFA by the four accused or the respondents; and

(c) there is no link between the proceeds derived from the predicate offence and the property to be seized or forfeited.

[121] Under s 56 of the AMLATFA, as alluded to earlier. the PP has to be satisfied that the money and property has been obtained as a result of or in connection with an offence under sub-s 4(1) of the AMLATFA or a terrorism financing offence or terrorist property or the proceeds of an unlawful activity before applying to the High Court judge for an order of forfeiture.

[122] Likewise, the High Court judge to whom the application is made shall make an order of forfeiture only if he is satisfied that the money and property is the subject matter of or was used in the commission of an offence under

sub-s 4(1) of the AMLATFA or terrorism financing offence or is a terrorist property.

[123] Further the High Court judge must also be satisfied that there is no claim from any bona fide third parties purchaser in good faith for valuable consideration in respect of the property before he can order such property to be forfeited.

[124] In the case of *Pendakwa Raya v Abdul Razak and Ors* [2009] MLJU 195; [2009] 1 LNS 322, there was an application for forfeiture under s 37(3) of the Anti-Corruption Act 1997. In this case the judge accepted that 'satisfied' must mean '*being reasonably satisfied on the facts of the case*' It cannot import an arbitrary or irrational state of being satisfied. Satisfaction must be honest, careful and deliberate, arrived after exercising due care and caution. The question of satisfaction is however a question of fact'.

[125] In the case of *Tan Teik Soon & Ors v Public Prosecutor* [2004] 2 MLJ 608, there was an application for forfeiture under s 6(4) of the Betting Act 1953. The judge had to be satisfied that the money sought to be seized was used, or intended to be used for wagering. In this case, the court was also of the view *that there must be sufficient facts and evidence before the judge before he can form an opinion that the properties seized was either used or intended to be used in the commission of the predicate offence*, which in this case was betting/wagering. In this case an expert report was tendered to establish that the money was connected to the predicate offence. Additionally there was a plea of guilt without qualification by the persons charged. On these facts an order for forfeiture was made.

[126] Based on all the facts above, the learned judge is correct when he made a finding that the PP has failed to establish that the proceeds in the form of money and property was the subject-matter or was used in the commission of an offence of money laundering. In such circumstances, the learned judge feels it is impossible for the PP to have been satisfied, that it was appropriate under the circumstances, to apply for an order of forfeiture of the money and property under s 56(1) of the AMLATFA. Likewise, under s 56(2) the learned judge is not satisfied, notwithstanding whichever standard of proof is required, ('tanpa mengira apakah standard of proof yang dikehendaki'), that an offence of money laundering has been committed. What the learned judge meant was that whether the standard of proof is beyond reasonable doubt or on the balance of probabilities, he is still not satisfied that an offence of money laundering has been committed with regard to the money and property in the hands or accounts of all the respondents. In that, we find no error in the learned judge's appreciation of the evidence, which taking into consideration all the facts of the case, are correct.

[127] Further, the respondents have also tendered sufficient documents to justify and explain the manner the said money were applied in paras 12–25 of Dato' Faizal's first affidavit.

[128] In conclusion, we agree with the learned judge that the PP could not succeed in its application under s 56 of the Act for the following reasons:

(a) the relationship of the parties was at all times governed by contract;

(b) parties were at all times acting on advice of solicitors when they entered into these contracts;

(c) all payments were made on the issuance of an architects certificate with letters of consent from PKA;

(d) there was no reason for the respondents to suspect that Datin Paduka OC Phang had acted beyond her authority. The internal workings of PKA are not matters within the knowledge of the respondents;

(e) there was no reason for the respondents to know or have reason to believe that any of the payments made under these contracts were illegitimate. These payments were made from 2004–2008 without complaint by PKA or any other party; and

(f) the PP has failed to prove that the money and property sought to be forfeited was paid by PKA to KDSB as 'as a result of' or 'in connection with' the drainage and water supply works and the 33KV electrical infrastructure work.

[129] As to the other money and property in the accounts or in the hands of the second till the ninth respondents, the affidavits of the PP do not disclose or was able to link that they were proceeds that have been obtained as a result of or in connection with money laundering under sub-s 4(1) of the AMLATFA or from the predicate/serious offences as deposed by the PP, and that since the PP failed to satisfy the learned judge that the respondents knew or have reason to believe the same (that they are the subject-matter of or was used in the commission of an offence under sub-s 4(1) or from the predicate offences committed by the four accused), and that since there are no bona fide third parties claiming as purchaser in good faith for valuable consideration in respect of the money and property, the learned judge had rightfully released the money and property to the respondents as legal owners.

THE USAGE OF AFFIDAVITS IN FORFEITURE PROCEEDINGS UNDER S 56 OF THE ACT

[130] The learned judge state that it is preferable (*lebih baik*) for an application under s 56 of the Act to be determined in a full trial rather than be

A based on affidavit evidence and that since the application is a criminal application, the affidavits filed by the applicant/PP has to be sworn and affirmed before a magistrate or registrar as provided under s 424 of the CPC.

B **[131]** The PP submitted that the High Court erred in law and fact in not accepting the affidavit of the investigation officers when affidavit evidence is in fact an accepted practice and procedure under an application made under s 56 of the AMLATFA.

C **[132]** In support of his submission, the PP referred to previous decisions of the Court of Appeal in *Teh Tek Soon* and *Public Prosecutor v Billion Nova Sdn Bhd & Ors* [2016] MLJU 1823; [2016] 2 CLJ 763.

D **[133]** The respondents on the other hand submitted that affidavit evidence is an exception that must be statutorily provided for if it is to be used in the first place. In this context, the respondents are saying that the only exception for affidavit evidence to be used is if the application is made under s 53 of the AMLATFA which expressly allows for the usage of affidavit evidence.

E **[134]** On this issue, we are of the view that the learned judge has erred since affidavit evidence may be used in an application under s 56 of the AMLATFA as it has been a common practice and accepted as the proper mode of procedure.

F **[135]** Further, the forfeiture proceeding under s 56 is a civil forfeiture proceeding as stated in ss 56(4) and 70(1) of the AMLATFA where the standard of proof is on a balance of probabilities. We do not see any prejudice arising as a result of the usage of affidavit evidence because all parties are given the opportunity to rebut any allegations made and also to disclose whatever G evidence necessary in support of their necessary contentions.

[136] In perusing the AMLATFA it does not disclose in what manner affidavit evidence is to be governed and used in a s 56 application. The CPC is also silent on this except the fact that affidavit evidence may be used as per s 424 H of the CPC.

[137] This being the case, reference would have to be made to O 41 of the Rules of Court 2012 (PU(A) 205/2012) ('the ROC 2012'). Although this law governs civil proceedings, it is applicable in a forfeiture application such as this. I This is especially so as forfeiture proceeding under s 56 is a civil forfeiture proceeding.

[138] Accordingly, we are of the view that any affidavit intending to be used in a s 56 application must comply in terms of form and substance with O 41 of the ROC 2012.

THERE IS VIOLATION IN RESPECT OF ART 13 OF THE FEDERAL CONSTITUTION IF THE PROPERTY IS FORFEITED BY THE APPELLANT (GROUND 7)

[139] The appellant submitted that the learned judge erred in law when he decided that s 56 proceedings is a violation or an infringement of art 13 of the Federal Constitution.

[140] We are in agreement with the PP that assuming that a s 56 proceeding is found to be inconsistent with art 13, s 56 shall remain valid. In other words, s 56 cannot be challenged on the ground that it is inconsistent with art 13 of the Federal Constitution.

[141] In *Public Prosecutor v Thong Kian Oon & Ors* [2012] 10 MLJ 140; [2012] 8 CLJ 119, the High Court stated as follows:

> The learned counsel argued that s 56 of the Act is inconsistent with art 13 of the Federal Constitution and therefore by virtue of art 4(1) of the Federal Constitution it is void. The learned DPP countered his argument by submitting that was required for the legislation in question to be constitutional was for it to have been validly passed by the Parliament. Hence the validity of any duly enacted piece of legislation could not be questioned on grounds of reasonableness, no matter how subjective or arbitrary the law appeared to be. On this issue, I do not find any force in the submission made by the learned Counsel for the respondents; and I find merit in the submission made by the learned DPP. The decision of the Federal Court in the case of *Arumugam Pillai v Government of Malaysia* [1975] 2 MLJ 29; [1975] 1 LNS 2 clarified the correct position of the law is that:
>
> > Whenever a competent legislative enacts a law in the exercise of any of its legislative power, destroying or otherwise depriving a man of his property, the latter is precluded from questioning its reasonableness by invoking art 13(1) of the Constitution; however arbitrary the law might probably be.

[142] In *Ketua Polis Negara & Anor v Gan Bee Huat and other appeals* [1998] 3 MLJ 86; [1998] 3 CLJ 1, on whether s 32 of the Dangerous Drugs (Forfeiture of Property) Act 1988 ran foul of art 13 of the Federal Constitution, the Supreme Court held as follows:

> Now the fourth and the last complaint was in fact, as submitted by learned counsel for the respondent, the main thrust of his argument. According to him, s 32 of the Act is inconsistent with art 13 of the Federal Constitution and therefore by virtue of

art 4(1), it is to that extent void. We fail to see how his submission can legally be supported for it is really a non-starter. The Dangerous Drugs (Forfeiture of Property) Act 1988 was enacted by Parliament in pursuance of art 149 of the Federal Constitution. Articles 13 and 149(1) read:

> (1) No person shall be deprived of property save in accordance with law.
>
> (2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.
>
> ...

Even assuming therefore that s 32 is found to be inconsistent with art 13, by the express authority of art 149(1), the said section shall remain valid. In other words, s 32 cannot be challenged on the ground that it is inconsistent with art 13 of the Federal Constitution.

[143] The Federal Court in the case *Public Prosecutor v Lau Kee Hoo* [1983] 1 MLJ 157 at p 159 on the constitutionality of the Internal Security Act 1960 (Act 82) (Revised 1972) held as follows:

> The ISA is legislation against subversion expressly authorised by art 149 of the Constitution. Mr Karpal Singh conceded that the Act was constitutional; that being so we cannot see how it can be said that the impugned section is invalid as being contrary to art 5(1); because that article itself expressly provides that any provision of law enacted under the article is valid 'notwithstanding that it is inconsistent with art 5; per *Ketua Polis Negara & Anor v Gan Bee Huat and other appeals* [1998] 3 MLJ 86 (SC).

[144] Thus the forfeiture of property under s 56 of the AMLATFA is valid since the Act has been passed by Parliament and to that extent the learned judge had erred in law in stating that it is unconstitutional and in violation of art 13.

CONCLUSION

[145] Based on the above reasons, the learned judge has properly appreciated the facts and the law and applied it to the facts of the case. Though certain findings on the law is misconceived (that the Act violates art 13 of the Federal Constitution and the use of affidavit evidence is unsuitable and not permissible since it is hearsay), the majority of the finding of facts and the law by the learned judge are correct. In such circumstances, after hearing the oral submissions of the respective parties and having perused the written submissions and the records of appeal, we are of the view that there is no merit in this appeal to warrant our appellate intervention. The appeal is thereby dismissed.

Appeal dismissed.

Reported by Kohila Nesan